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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1771

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF CERTIORARI

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MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF CERTIORARI

Pursuant to Rule 21(4) of this Court's Rules, respondent National Association of Regulatory Utility Commissioners (NARUC) submits its memorandum supporting the petition of the People of the State of California and the California Public Utilities Commission (California PUC) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 14, 1977.

STATEMENT OF THE CASE

This case involves the questionable assertion of jurisdiction by the Civil Aeronautics Board (Board) over the flights of two intrastate air carriers, Air California (AirCal) and Pacific Southwest Airlines (PSA),[1] and the granting by the Board of restricted exemptions allowing these carriers to serve Lake Tahoe, California (Tahoe), located near the California-Nevada state line. Both AirCal and PSA hold authority from the California PUC to provide air service between Tahoe and other California points, either in single line service or through "tacking" their non-stop Tahoe authority to serve other points on their system on a one-stop basis.

Apparently in deference to the Board's view that neither carrier could hold out to provide service to Nevada points without Board authority, regardless of whether the individual flights crossed state lines, PSA and AirCal, on March 11 and March 14, 1975, respectively, applied for exemption from the Board's economic regulation. By Order 75-6-135, adopted June 27, 1975, the Board granted restricted exemptions, stating:

> [B]ecause the Tahoe Valley Airport serves an area of Nevada as well as California, the inability of the applicants to hold out, advertise and promote the availability of Nevada destinations artificially constricts full development of the Lake Tahoe markets, thereby diminishing the prospects for an economically successful, high quality pattern of service.[2]

While not examining at length the precise grounds for taking jurisdiction over the subject matter of the ap-

[1]PSA and AirCal will sometimes be referred to collectively as the "carriers."

[2]Order 75-6-135, reprinted as appendix C to the Petition for Writ of Certiorari, pages 22-33 at 27-28.

plications, the Board made reference to the carriers' submitting themselves to its jurisdiction and noted that "if the Board were to grant exemptions as broad as those requested herein, operations which at this time are considered purely intrastate would become interstate and, therefore, subject to the Board's jurisdiction."[3]

The Board thereupon granted the exemptions only to the extent of allowing PSA to hold out the availability of Nevada destinations on Tahoe flights serving Los Angeles International and Burbank Airports and allowing AirCal to serve the Oakland and San Jose Airports. In addition, the Board restricted these operations against interline ticketing or baggage handling and prohibited the carriers from publishing connecting schedules or extending single carrier service beyond the above named points by "tacking or connecting Tahoe *flights* [emphasis added] with their intrastate systems."[4]

The Board continued by stating that such restrictions were necessary because "air service at Lake Tahoe is interstate in nature by definition. That is to say, PSA and AirCal are *now* engaged in air transportation without Board authority,"[5] and "any Board decision to grant specific certificate or exemption authority to engage in air transportation at Lake Tahoe constitutes an affirmative exercise of the Board's regulatory jurisdiction . . . precluding the P.U.C. from taking any action in contravention of such a determination."[6]

Subsequent proceedings at the Board level, in which the NARUC participated, resulted in Order 75-9-78, adopted September 22, 1975, which modified the prior order with respect to the type of aircraft which could be used under the

[3]*Id.* at 28.

[4]*Id.* at 28-9.

[5]*Id.* at 29.

[6]*Id.* at 30.

exemption but upheld the prior order in all other respects. In Order 75-9-78, it was recognized that the NARUC, the California PUC and AirCal objected to the Board's understanding of what constituted "interstate air transportation," but the Board upheld this determination on the ground that it had applied this definition for some years.[7] In addition, the Board reaffirmed its self-derived test of "the essential nature of the traffic" as an apparent basis for jurisdiction and for the placing of restrictions on the exemptions granted.[8]

On November 6, 1975, and November 21, 1975, respectively, California PUC and the NARUC petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the foregoing orders of the Board.[9] The cases were consolidated by the Court and an initial joint brief was filed on February 25, 1976, by both petitioners who argued, *inter alia*, that the Board had no jurisdiction to regulate the service in question and that the Board had no factual basis for its determination as to the nature of this service.

During the pendency of the court proceeding, by Order 76-3-114, adopted March 16, 1976, the Board extended the exemptions and initiated a proceeding in *Lake Tahoe Service Investigation*, Docket 29000, in order to ascertain the intrastate/interstate mix of the passengers at Lake Tahoe. In instituting the investigation proceeding, the Board stated:

> The Board's decision has resulted in the surfacing of a fundamental conflict of jurisdiction which has, in turn, fostered confusion and uncertainty among the airlines involved and the traveling public. We remain convinced that air

[7]Order 75-9-78, reprinted as appendix D to the Petition for Certiorari, pages 34-44, at 42.

[8]*Id.*

[9]AirCal and PSA subsequently intervened as parties.

> service at Lake Tahoe is interstate in character under prevailing law, but we believe that the PUC and other interested persons should have a forum in which to present empirical evidence to the contrary.[10]

In its decision, entered March 14, 1977, the court (Judge Wilkey dissenting) upheld the orders of the Board. The basic premise of the court appears to be that the subsequently initiated investigation in Docket 29000 renders the arguments of the NARUC and the California PUC abstract and theoretical and that, therefore, no justiciable case or controversy has been presented. The lower court at no time addressed the issue of the Board's underlying jurisdiction to issue the orders and focused on what it termed the "dicta" of the Board in prematurely announcing its attitude as to the nature of air service at Tahoe. Although specifically recognizing the lack of factual basis for the Board's analysis, the court apparently found no controversy resulting from the Board's basing its jurisdiction and subsequent actions on pure conjecture.

REASONS FOR GRANTING THE WRIT

The petition should be granted in order that this Court may correct the erroneous and precedentially dangerous decisions of the Board and the court below.

The result reached by the lower court simply does not address the issues before it, nor can that result be squared with sound legal reasoning. Rather, the court has not even considered whether the Board's rulings were based on insufficient evidence of jurisdiction and insufficient evidence to support the substance of those rulings. By interpreting the petitioners' objections as relating solely to specific language used by the Board and through classifying this language as "dicta," the court has skirted the underlying

[10]Order 76-3-114, reprinted as appendix E to the Petition for Writ of Certiorari, pages 45-54, at 49.

issues before it and determined that no real case or controversy exists. Contrary to the interpretation of the court below, the petitioners, including the NARUC, were not objecting to any specific language used by the Board, but to the import of that language, *viz.:* the Board has jurisdiction over the matter, certain restrictions should be imposed on the carriers, and the California PUC can no longer regulate Tahoe service. Indeed, from the language of the Board's orders, it is difficult to ascertain exactly what is alleged as a basis for jurisdiction and what constitutes the legal authority for the substance of the Board's action. The unsupported statement that "air service at Lake Tahoe is interstate in nature by definition" only serves to point out the arbitrary methodology used by the Board in fashioning its orders.

However, a careful analysis of the Board's orders does permit the reader to glean the general thrust of its view of the law under which it operates and, of more immediate importance, the effect of this view on the California PUC, the carriers and numerous intrastate passengers:

> 1) Because the Board considers that a *de minimis* number of passengers who commence and terminate their air travel in California may cross the state line into Nevada, the Board has jurisdiction over the entire flight and over service provided those passengers travelling entirely intrastate;
>
> 2) Because of the considerations which allegedly give the Board jurisdiction, certain substantive restrictions must be imposed on these flights, even though the restrictions affect intrastate passengers;
>
> 3) Because of the Board's unsupported views, the flights are already interstate flights and the California PUC is precluded from regulating air service provided to passengers who may never cross the state line; and
>
> 4) Because the Board does not know how many Tahoe passengers, if any, are actually moving in interstate commerce, the Board has instituted a proceeding to ascertain the facts.

When compared to the plain language of Sections 101, 401, and 416 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301, 1371, and 1386, these conclusions constitute a complete and utter disregard of proper administrative procedure and of the statute under which the Board operates.

Section 1371 of title 49 requires that "No *air carrier* shall engage in any *air transportation*" without a certificate authorizing it "to engage in *such transportation*" [emphasis added]. Section 1386(b)(1) allows the Board authority to exempt any "air carrier" from the subchapter under certain circumstances. Section 1301(3) defines "air carrier" as "any citizen . . . who undertakes to engage in air transportation." Section 1301 (10) defines "air transportation" as "interstate, overseas, or foreign air transportation." "Interstate air transportation," in turn, is defined in Section 1301(21) as "the carriage by aircraft of *persons* [emphasis added] or property as a common carrier . . . by aircraft, in commerce between . . . (a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States or the District of Columbia."

Thus the Act, on its face, requires only that an "air carrier" must have a certificate authorizing "air transportation" or be exempted from that requirement under Section 1386(b)(1). Yet that certificate, although issued to a carrier under the Board's jurisdiction, cannot authorize more than the performance of "air transportation." The Board has no jurisdiction to authorize, prevent or restrict

anything but "air transportation" and such other aspects of the carrier's business as are specifically covered by statute.[11]

The carriage of "persons" between points in different states is "air transportation"; the carriage of persons between points in the same state is not. It is true that any carrier which provides, in any part, "interstate air transportation" is subject to certification or exemption; however, this cannot, in and of itself, give the Board jurisdiction to regulate totally intrastate service provided by a certificated carrier.

On any given AirCal or PSA flight, there may be a mixture of passengers — those ultimately destined for Nevada and those who will remain in California and never leave the state. Neither AirCal nor PSA could, by definition, provide this latter category of passengers with "air transportation" even if other persons on board the same flight continued into Nevada on their own and could arguably be considered "in the stream of interstate commerce." Thus the Board cannot assert jurisdiction over an entire flight simply because it alleges that a *de minimis* number of passengers on that flight are possibly interstate passengers.[12] Nor can any statements of the Board concerning the nature of air traffic at Tahoe form a legitimate basis for the substantive restrictions imposed where those restrictions affect intrastate air transportation or the California PUC's power to regulate such transportation.

The arguments condemning the procedure used by the Board cannot be better expressed than in Judge Wilkey's dissent:

[11]For example, 49 U.S.C. Section 1377 empowers the Board to require "air carriers" to keep and submit reports and financial records.

[12]This principle has been implicitly recognized for years in the dual fare structure in effect on other combined interstate/intrastate air transportation in the state of California.

> Anyone familiar with principles of judicial review of administrative agency action would have thought that the present total absence of a factual basis for the Commission's [sic] action was a vice calling for the action to be set aside, not a virtue inducing the Court to sustain agency action while the supporting facts are gathered over a period of years.[13]

And, although the NARUC has noted the difficulty of separating the jurisdictional from the substantive rulings in the Board's orders, the issue remains that the Board did not base its understanding of either on any facts in its possession.

It may well be that, upon ascertaining a reasonable estimate of the "mix of interstate and intrastate passengers," the Board will be able to devise a reasonable dual regulatory system for service at Tahoe. This, of course, would require a legal conclusion, based on facts of record, that some definite portion of the service at Tahoe is "interstate air transportation." Even then it is doubtful that the Board could assert jurisdiction over that other portion of service which is purely intrastate. However, at the present time, the Board has no power whatsoever to issue substantive orders which adversely affect the people of California, the California PUC or any other party before it.

An agency may have the power to investigate and to establish facts in support of its jurisdiction to take substantive action, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946). This is what the Board is allegedly attempting to do in Docket 29000. However, the NARUC finds no support for the proposition that an agency may make substantive rulings, adversely affecting parties, without any evidence of its authority to do so. Indeed, the cases which have even

[13]Dissenting opinion of Judge Wilkey, reprinted at appendix A to the Petition for Writ of Certiorari, at pages 8-9.

touched on this issue serve as bold warning that such activity will not be tolerated. In *North Carolina v. United States*, 325 U.S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260 (1945), this Court succinctly stated the principle that "the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, *supported by evidence* [emphasis added], of each element essential to the exercise of that power by the Commission." 325 U.S. at 511.

> The insistence that the Commission make these jurisdictional findings before it undertakes to act . . . gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. *Yonkers v. United States*, 320 U.S. 685, 691-2, 88 L. Ed. 400, 404, 64 S. Ct. 327 (1944).

Whether the Board's view as to the "nature of air service at Tahoe" is the ground for its jurisdiction or for its substantive ruling, it most certainly is not "dicta." The lower court's decision ignores the well-established principle that an agency must base its jurisdiction and its substantive orders on concrete evidence. In this regard, the decision of the lower court is so alien to this Court's prior rulings as to amply warrant the granting of California's Petition for a Writ of Certiorari. And, aside from the direct injury that this decision inflicts upon the petitioner and other parties, the mere existence of such dangerous precedent in administrative law should constitute good cause for this Court to invoke its discretionary jurisdiction. Indeed, the facts as set forth by the petitioner and by the NARUC, when viewed in light of the applicable statutes and case law, render this case appropriate for summary reversal. *Ewing v. Gardner*, 341 U.S. 321, 95 L. Ed. 968, 71 S. Ct. 684 (1951).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted, and the order of the United States Court of Appeals for the District of Columbia should be summarily reversed and remanded with instructions to annul and set aside the Board's orders.

Respectfully submitted,

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